FILE COPY

FILED
FEB 26 1936
CHARLES ELMORE CROP

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. [redacted] 2

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith et al.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JEFFERSON P. CHANDLER,
HOWARD W. WRIGHT,
ARCHER B. DORMAN,
631 Van Nuys Bldg., 210 W. 7th St., Los Angeles, Calif.
Attorneys for Petitioner.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

PAGE

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit 3

A.

Summary Statement of the Matter Involved 4

I.

History of the Case 4

II.

Question Involved:

Is the United States an Indispensable Party to a Suit Brought to Declare and Enforce a Trust in an Oil Lease, by the Patentee of Land (Oil Reserved to the United States) Vested With a Preference Right to Prospect for Oil and to a Lease in Case of Discovery, Against a Subsequent Fraudulent Permittee and Lessee of the United States? 5

III.

Statement of Facts 5

B.

Reasons for Granting the Petition 6

PAGE

Brief in Support of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit 9

I.

Opinion Below 9

II.

Jurisdiction 10

III.

Question Involved 10

IV.

Statement of the Case 11

V.

Specification of Error 11

VI.

Statute and Regulation Involved 11

VII.

1. Present Decision Creates Conflict of Law in Circuit Courts.. 12
2. Present Decision Creates a Conflict With the Tenth Circuit Court of Appeals 15
3. Present Decision Is in Probable Conflict With Applicable Decisions of This Court 18
4. Present Decision Conflicts With Specific Affirmation of Jurisdiction Contained in Section 31 of Leasing Act 21
5. The Present Decision Presents an Important Question of Federal Law 22

Cases Cited by Circuit Court of Appeals to Sustain Instant Decision Differ as to the Facts and Remedy Sought 23

Conclusion 27

TABLE OF AUTHORITIES CITED.

CASES.

PAGE

Alaska Oil Fields v. Raims, 54 Fed. (2d) 868 ..... 13, 20, 27

Louisiana v. Garfield, 211 U. S. 70 17

Matt Mechaley, 51 L. D. 413 19

Milwaukee v. Milwaukee, 2 Wall. 609 (69 U. S. 895) 23

Moore v. United States, 270 U. S. 151 10

Proctor v. Painter, 300 Fed. 476, C. C. A., 15 Fed. (2d) 974 ..... 23, 25, 27

Shaw v. Rink, 50 L. D. 411 19

Skeen v. Lynch, 48 Fed. (2d) 1044 (cert. denied 284 U. S. 633) 7, 15, 17, 20, 23, 27

Waterman v. Canal Louisiana Bank, 215 U. S. 33 ..... 7, 18

Wilson v. Elk Coal Co., 300 Fed. 473, C. C. A., 7 Fed. (2d) 112 ..... 23, 24, 25, 26, 27

Witbeck v. Hardeman, 51 Fed. (2d) 450 (1931, Fifth Circuit Court of Appeals, affirmed in 286 U. S. 444) 4, 6, 12, 14, 15, 18, 20, 23, 27

STATUTES.

Judicial Code, sec. 24, par. 1 10

Judicial Code, 240-a, 43 Stats. 938; 28 U. S. C. A., sec. 347 10

Leasing Act, sec. 31 21

35 Statutes 639 5

41 Statutes 437 5

United States Code Annotated, Section, Title 28, par. 225 (Judicial Code, sec. 128) 10

30 United States Code Annotated 214 11

30 United States Code Annotated 371 5

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. .....

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith et al.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Jean Bourdieu, respectfully shows to this Honorable Court that this is a petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review a decision made and entered by that court on December 20, 1935, dismissing the suit for want

of jurisdiction, thereby reversing the decision of the United States District Court for the Southern District of California on that point.

A.
SUMMARY STATEMENT OF THE MATTER INVOLVED.

I.
HISTORY OF THE CASE.

Petitioner filed suit on July 1st, 1931, in the United States District Court for the Southern District of California to declare and enforce a trust in a certain oil lease issued to respondents in or about December, 1929, by the United States, in so far as the terms of this lease apply to a half section of land situated in Fresno county, California, which had been patented to petitioner under the homestead laws. Motions to dismiss the complaint because the United States was not a party defendant were filed in the United States District Court. These motions were denied on the authority of *Witbeck v. Hardeman,* 51 Fed. (2d) 450 (1931, Fifth Circuit Court of Appeals, affirmed in 286 U. S. 444). Respondents did not appeal from this decision. The District Court subsequently rendered a decision on another issue in favor of respondents. Petitioner made timely appeal from this decision to the Ninth Circuit Court of Appeals. On December 20, 1935, the Circuit Court of Appeals dismissed the appeal on the sole ground of jurisdiction, "it appearing that the United States was not a party defendant to the suit and, therefore, the motions to dismiss made by appellees in the court below should have been sustained" [R. 378]. A petition for a rehearing was denied on January 27, 1936.

II.

QUESTION INVOLVED.

Is the United States an Indispensable Party to a Suit, Brought to Declare and Enforce a Trust in an Oil Lease, by the Patentee of Land (Oil Reserved to the United States) Vested With a Preference Right to Prospect for Oil and to a Lease in Case of Discovery, Against a Subsequent Fraudulent Permittee and Lessee of the United States?

III.

STATEMENT OF FACTS.

Petitioner filed application and made entry of the land involved as a homestead on March 6, 1919, under the Act of February 19, 1909 (35 Statutes 639). Thereafter, on October 25, 1925, patent to said land was issued to petitioner with title to any oil which might thereafter be found retained by the United States under provisions of the Act of July 17, 1914 (30 U. S. C. A. 371), subject to which preference rights have been issued.

At all times since the 6th day of March, 1919, petitioner has been, and still is, the owner and in possession of this land and, since February 25, 1920, he has been entitled to a preference or exclusive right to prospect upon his land for oil and, in case of discovery thereof, to a lease therefor by virtue of Section 20 of the Leasing Act of February 25, 1920 (41 Statutes 437), *infra*.

The Leasing Act provides that the Secretary of the Interior shall promulgate regulations for the exercise of the preference right. The regulations issued in accordance therewith provided that the loss of the preference

right of the homesteader should be governed wholly by the presentation of adverse application, and that *"written notice"* from such adverse applicant must be served upon the homesteader before he could be divested of this preference or exclusive right. Upon receiving this notice he must, within thirty days thereafter, make application or file his intention. This regulation has the force and effect of law.

The law provided, further, that a bond must be furnished the homesteader by any adverse applicant to protect him from any damage which he might suffer by reason of any prospecting being done upon his land. No notice of any kind was furnished to the petitioner, nor was any bond given him as required by law. The permit to prospect was obtained by filing false affidavit as to the facts when the adverse application was made. No prospecting had been made on this land by respondents at the time of filing suit, nor was made until nearly two years thereafter.

B.

REASONS FOR GRANTING THE PETITION.

1. The decision of the United States Circuit Court of Appeals for the Ninth Circuit is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Witbeck v. Hardeman,* 51 Fed. (2d) 450 (affirmed 286 U. S. 444). For the purpose of determining the issue of jurisdiction, and from a *stare decisis* viewpoint, the facts of the instant case are identical with the facts in that case.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decision of the Circuit Court of

Appeals for the Tenth Circuit, in the case of *Skeen v. Lynch* (second count), 48 Fed. (2d) 1044 (cert. denied 284 U. S. 633).

3. In the instant case the Ninth Circuit Court of Appeals has decided an important federal question of law in a manner probably in conflict with applicable decisions of this court. The decision is in conflict with the decision of this court in the case of *Waterman v. Canal Louisiana Bank,* 215 U. S. 33. The case of *Witbeck v. Hardeman* was affirmed by this court in 1932, 286 U. S. 444. In that case, if there had been no jurisdiction on account of the absence of the United States as a party defendant, this court, of its own cognizance, would have dismissed the case and would not have affirmed the decision, the point having been raised in, and passed upon by, the Circuit Court of Appeals.

4. The decision of the Ninth Circuit Court of Appeals denies the affirmation of specific jurisdiction conferred upon federal district courts by Section 31 of the Leasing Act.

5. The issue in this case also presents an important question of federal law which has been decided by the Supreme Court by inference in *Witbeck v. Hardeman, supra,* but which should be decided directly to settle the question. Under the provisions of the Leasing Act of February 25, 1920, the ownership of the United States of the mineral rights in millions of acres of land became permanent. This mineral is subject to permits to prospect and to leases. It is a question of great public interest and concern as to whether the United States is an indispensable party in a suit involving this mineral which does not affect the proprietary interest of the United States,

but does affect the interests of its permittee or lessee therein.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled: "Docket No. 7808, Jean Bourdieu, Petitioner, vs. Pacific Western Oil Company *et al.*, Respondents", and that the decree of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, that the cause be remanded to the Circuit Court of Appeals for the Ninth Circuit for further proceedings, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Respectfully submitted,

JEFFERSON P. CHANDLER,
HOWARD W. WRIGHT,
ARCHER B. DORMAN,
Attorneys for Petitioner.

631 Van Nuys Building, 210 West Seventh Street,
Los Angeles, California.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. .....

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith et al.,

Defendants.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered, entered and

filed on December 20, 1935, unreported to date [R. 364]. The opinion of the United States District Court on motion to dismiss was not reported.

II.

JURISDICTION.

1. The decree to be reviewed was entered December 20, 1935 [R. 364]. A petition for a rehearing was denied January 27, 1936. The time to apply for a writ of certiorari, therefore, runs from January 27, 1936.

Moore v. United States, 270 U. S. 151, 153.

2. The federal courts have jurisdiction to determine issues arising out of the construction of federal statutes. (Judicial Code, Sec. 24, par. 1.) Appeal to the Circuit Court of Appeals was taken in pursuance of the provisions of Section U. S. C. A., Title 28, par. 225 (Judicial Code, Sec. 128).

3. This court has jurisdiction to review the judgments of the Circuit Court of Appeals (Judicial Code, 240-a, 43 Stats. 938; 28 U. S. C. A., Sec. 347).

III.

QUESTION INVOLVED.

Is the United States an Indispensable Party to a Suit, Brought to Declare and Enforce a Trust in an Oil Lease, by the Patentee of Land (Oil Reserved to the United States) Vested With a Preference Right to Prospect for Oil and to a Lease in Case of Discovery, Against a Subsequent Fraudulent Permittee and Lessee of the United States?

IV.

STATEMENT OF THE CASE.

A summary statement of the case to determine the issue of jurisdiction has been given under heading "A" in the petition. In the interest of brevity, the statement will not be repeated here.

V.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals for the Ninth Circuit erred in reversing the United States District Court denying appellees' motion to dismiss and in holding that there was no jurisdiction, "it appearing that the United States was not a party to the suit, and therefore the motions to dismiss made by the appellees in the court below should have been sustained" [R. 378].

VI.

STATUTE AND REGULATION INVOLVED.

Section 20 of the Leasing Act (30 U. S. C. A. 214) provides:

> "Sec. 20. In the case of lands *bona fide* entered as agricultural, . . . if the entry has been patented with the mineral right reserved, the patentee shall be entitled to a preference right to a permit, and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entrymen and patentees or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres, for the purpose of making joint application."

The regulation promulgated to carry this Act into effect provides [R. 130]:

> "Should an applicant for permit for entered or patented lands with the reservation of the oil and gas content to the United States, be filed by a person other than the entryman or owner of the land, the applicant will be required to serve *personal notice* of such application upon the owner or owners of the land so entered or patented, with a warning therein that if said owner desires to exercise his preference right, if any, to a permit he must file application therefor within thirty days of said notice or warning."

VII.

1. PRESENT DECISION CREATES CONFLICT OF LAW IN CIRCUIT COURTS.

The decision of the Circuit Court of Appeals for the Ninth Circuit is contrary to and is in conflict with the decision of the Fifth Circuit Court of Appeals in the case of *Witbeck v. Hardeman,* 51 Fed. (2d) 450, affirmed 286 U. S. 444. It will be seen that the facts of that case are identical with the instant case for the purpose of determining the issue of jurisdiction.

In *Witbeck v. Hardeman* each party desired to prospect for oil on public land, both being qualified under the act to do so. On November 9th Witbeck made oath to his application for permit and mailed it, with the required fee. Hardeman went on the land on November

11th, erected a monument and posted notice thereon, as provided in Section 13 of the Leasing Act, in order to acquire a preference to a permit for thirty days by a stranger to the title over subsequent applicants. Neither claimed a landowner's preference under Section 20. Witbeck, contrary to law, was issued a permit by the Secretary. Hardeman brought a bill in equity against Witbeck *to establish his preference right to prospect* and to be substituted as the permittee. He asked that he be declared the equitable owner of the permit. In this suit, *the United States was not made a party.* On these facts, the United States District Court dismissed the bill for want of jurisdiction "because it concerned property belonging to the United States". The Fifth Circuit Court of Appeals reversed this decision, holding that the United States, though having title and a proprietary interest, was not a necessary party as it would not be injured by any decision rendered. This court affirmed that decision.

In the case of *Alaska Oil Fields v. Raims,* 54 Fed. (2d) 868, the plaintiff therein sought to attach and foreclose the interest of defendant in an oil prospecting permit and lease issued by the United States to defendant. Defendant moved to dismiss the bill because the United States was an interested party and was not named as a defendant. The United States District Court took jurisdiction. In affirming this opinion Judge Wilbur of the Ninth Circuit Court of Appeals, at page 873, states "in view of the fact that we concur in what was said by Judge

Sibley (*Witbeck v. Hardeman*), speaking for the court, we quote therefrom at length as follows":

> "The Secretary of the Interior would not have been a proper party to this suit . . .
>
> But having decided that the lands shall be exploited, he must recognize the statutory preference in issuing the permit, there being no discretion to ignore this plain mandate of the law . . .
>
> It is true that neither lease nor permit ends the interest of the United States in the land involved. If the court were undertaking to dispose of the land to the *injury of the United States,* they would be an indispensable party . . .
>
> But here the law makes the choice and the question is whether the Secretary, by mistaking the law, has given the contract to some one other than the one chosen and intended by the United States speaking through the Congress . . .
>
> But the difficulty is met by the assumption that the Secretary intends that leases and permits shall go to those whom the law entitles to them, and when a transfer is ordered to accomplish this, his consent is implied and may be compelled if refused."

The above language of Judge Wilbur is in direct conflict with the instant case. Therein he states that, although the United States has title or a proprietary interest, this does not necessitate its presence as a party. There must be something more. The suit must be such as to affect the right, title or interest of the United States by depriving it of all or some part of such right, title or interest. The United States must be affected by the result of the suit, and not merely interested in the subject-matter.

2. PRESENT DECISION CREATES A CONFLICT WITH THE TENTH CIRCUIT COURT OF APPEALS.

The decision of the Ninth Circuit Court of Appeals in the instant case on the issue of jurisdiction is not only in direct conflict with the Fifth Circuit Court of Appeals, but it is also in conflict with the Tenth Circuit Court of Appeals, as shown by *Skeen v. Lynch,* 48 Fed. (2d) 1044; cert. denied, 284 U. S. 633. The facts show that Skeen had title to 640 acres of land under the Stock Raising Act of December, 1916, with a reservation of "coal and other minerals" to the United States. The United States issued an oil prospecting permit and lease to defendants. Whereupon Skeen brought suit against this permittee and lessee of the United States without naming the United States a party defendant. This suit was brought on two counts. On the first count *Skeen claimed ownership of the oil on the principle of ejusdem generis as against the title* of the United States. On the second count he *sought a preference right to a permit to prospect* for oil and to a lease under Section 20 of the Leasing Act, as against the subsequent permittee, Lynch. He sought to hold defendant, permittee and lessee of the United States, as his trustee *ex maleficio.* On the first count, the United States would have been injured by the loss of title to the oil if plaintiff had prevailed. On the second count, involving a preference right to prospect under a permit from the United States, it would not have been injured. The suit on the second count is similar to *Witbeck v. Harde-*

man and the instant case, both as to the facts and remedy. The decision of the court in both cases granted jurisdiction on the cause of action asserting a preference right.

In a memorandum opinion the United States District Court held that, on the first count, the United States was not an indispensable party, and on the second that it was. We quote from this opinion:

First count:

> "The court is of the opinion, that for the purpose of construing the language, 'coal and other mineral', as used in the Act of December 29th, 1916, the United States of America is not a necessary or indispensable party. . . ."

Second count:

> "The court does not determine whether or not plaintiff had a preference right to obtain from the United States a permit to prospect for gas and oil for the reason that it is without jurisdiction in the absence of the United States or the Secretary of the Interior as a party to the suit."

On each count the decision of the District Court was wrong, as the jurisdictional question was urged on both counts. *The Tenth Circuit Court of Appeals reversed the opinion above on both counts and, in doing so, observed the correct rule* for which petitioner contends, namely: that the United States is an indispensable party if inter-

ested in the result of the suit, or if it would be adversely affected thereby, and not otherwise. This opinion of the Tenth Circuit Court of Appeals, in which certiorari was denied, held that the United States was not necessary for the purpose of jurisdiction on the second count, and decided this issue involving a preference right on the merits. On the first count, in which plaintiff *sought title to the mineral,* as against the title of the United States, the Circuit Court of Appeals stated:

> "As to the first cause of action, the court is of the opinion that the United States is an indispensable party . . .
>
> The interest of the United States in the subject-matter of litigation is not less obvious and substantial than it was in the case of *Louisiana v. Garfield,* 211 U. S. 70. . . .
>
> A decree for plaintiff on the first count would be a cloud on the title of the United States."

In the *Louisiana* case referred to the same principle was involved as in the *Skeen* case on the first count, since the state of Louisiana *sought title* as against the *title* of the United States. Hence, it is evident that the case of *Skeen v. Lynch* illustrates the distinction contended for by petitioner and observes the rule announced by this court to the effect that, if the absent party would be injured, it is an indispensable party; otherwise it is not.

3. PRESENT DECISION IS IN PROBABLE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

As Mr. Justice Day states in *Waterman v. Canal Louisiana Bank*, 215 U. S. 33, 49:

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case that will do justice between the parties actually before the court, without *injuriously affecting* the rights of such absent party. If the court can do justice to the parties before it *without injuring* absent persons, it will do so. We are, therefore, of the opinion that the court erred in holding that there was no jurisdiction, and the decree is reversed."

The present decision is in conflict with the above opinion of this court. Petitioner does not seek title against the United States. He seeks merely a preference right to prospect conferred upon him by law, just as Hardeman and Skeen (second count) did, and in both those cases it was held that the United States would not be injured.

The case of *Witbeck v. Hardeman* was affirmed by this court in 1932, 286 U. S. 444. In that case, if there had been no jurisdiction on account of the absence of the United States as a party defendant, this court, of its own motion, would have dismissed the case and would not have affirmed the decision, the point having been raised in and passed upon by the Circuit Court of Appeals.

This is not a suit against the United States, nor is any relief asked from the United States. Through fraud, the permit to prospect as to this land was granted to the wrong person. Petitioner seeks to be substituted for

the respondents, who wrongfully deprived him of his legal right. The prayer of the complaint states [R. 12]:

> "Wherefore, this plaintiff prays that this court render its judgment and decree as follows:
>
> That defendant Pacific Western Oil Company holds title to the hereinabove described lease in trust for this plaintiff insofar as said lease affects the property described in this complaint."

From the above it is clear that what petitioner asks is simply a substitution in which the Secretary could exercise no discretion under the terms of the law, Congress having made the choice of permittee when the law was enacted.

The objection that a decision in favor of petitioner would be an interference with the functions of the Land Department is not sound. Petitioner was not required to make application for a permit at any time before being served with *written notice*. The Department holds, in the case of *Matt Mechaley*, 51 L. D. 413, at p. 415:

> "Section 20 of the Leasing Act did not place any limitation upon the time allowed any entryman to assert a preference, and that limitation is governed wholly by the presentation of adverse application."

Again, in *Shaw v. Rink*, 50 L. D. 411, the necessity of such *written notice* by an adverse applicant, in order to divest the owner's preference right, is further emphasized.

From the above it is seen that there was no necessity of application to the Land Department in the absence of

written notice, and that there was no discretion which the Department could exercise. Such right has no relationship or dependence upon the claim of others, strangers to the title. It is sufficient that petitioner has been deprived of exercising his right by the fraudulent acts of respondents. Petitioner's preference right was by reason of the ownership and possession of the land. There could be no conflict between applicants by the terms of the law, which eliminates a possibility of the exercise of discretion in the matter.

The decisions in the *Witbeck v. Hardeman, Alaska Oil Fields v. Rains,* and *Skeen v. Lynch* (second count) *cases are controlling in the instant case on the issue of jurisdiction.* In those cases the court decided that the United States was not interested in the results of the suit, would not be injured by any decision rendered and, hence, was not an indispensable party.

If the decisions above are not the law for the instant case, then petitioner, whose interests have been prejudiced by fraud, and who is asking nothing of the United States, nor for anything which can affect the United States, has no redress in a court of equity. As he received no written notice or bond, as provided by law for his protection, he had no knowledge of respondents' application before the Land Department. It is elementary that, while such matters are pending before the Department, courts may not interfere or assume jurisdiction. Petitioner learned of respondents' lease by reading it in a local newspaper. If subsequent to the contract or lease, it is held that the United States must be a party, and that the United States may not be sued, this failure of remedy becomes obvious. Such is not the law. There is a remedy for every wrong.

4. PRESENT DECISION CONFLICTS WITH SPECIFIC AFFIRMATION OF JURISDICTION CONTAINED IN SECTION 31 OF LEASING ACT.

Even if it could be argued that, prior to 1920, there was no jurisdiction, the force of Section 31 destroys such argument. Petitioner has no remedy by mandamus. The jurisdiction of the federal courts is affirmed by Section 31 of the Leasing Act, which is declaratory of the law. It provides that the authority of the Secretary shall cease when a lease is executed, and that the federal District Courts shall have jurisdiction thereafter:

> "Sec. 31. That any lease issued under the provisions of this act may be forfeited and cancelled by an appropriate proceeding in the United States District Court for the district in which the property or some part thereof is located, whenever the lessee *fails to comply* with *any of the provisions of this act, of the lease,* or of the *general regulations promulgated under this act* and *in force at the date of the lease;* and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof."

It is to be noted that, if the lessee fails to comply with any of the provisions of the Leasing Act or the regulations promulgated thereunder, the lease is subject to forfeiture and cancellation in the federal courts. It obviously follows that the court would have jurisdiction to declare the lessee to be holding as a trustee, and to substitute the

petitioner in place of the lessee. Both the permit and lease issued provided that "all valid rights existing at the date of this permit (or lease) will not be affected thereby" [R. 219]. If the authority of the Secretary ceased when the lease was executed, it is self-evident that he could not be compelled to cancel a lease, the jurisdiction being entirely in the courts.

5. THE PRESENT DECISION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

The issue of jurisdiction in this case presents an important question of federal law which has been decided by the Supreme Court by inference in *Witbeck v. Hardeman*, but which should be decided directly to settle the question. Under the provision of the Leasing Act of February 25, 1920, the ownership by United States of the mineral rights in millions of acres of land became permanent. This mineral, under the declared policy of Congress, is subject to permits to prospect and to leases. It is a question of great public interest and concern, therefore, as to whether the United States is an indispensable party in a suit which does not affect the proprietary interest of the United States, but does affect the interest of its permittee or lessee therein.

CASES CITED BY CIRCUIT COURT OF APPEALS TO SUSTAIN INSTANT DECISION DIFFER AS TO THE FACTS AND REMEDY SOUGHT.

For the purpose of determining this issue of jurisdiction, it is presumed that petitioner had a preference right to prospect upon the land patented to him as his homestead, that this property right vested in him as the owner of the land, and could be divested by an adverse applicant only by compliance with the above provisions of law as to notice and bond.

> "In determining the question of jurisdiction, the facts set up by the bill must be considered true."
>
> *Milwaukee v. Milwaukee,* 2 Wall. 609 (69 U. S. 895).

The authorities relied upon by the Circuit Court of Appeals in its decision are readily distinguishable on the facts and remedies demanded and are not in point to determine the issue of jurisdiction. The distinction is that, in the case at bar, petitioner does not seek title or to have the court dispose of the land to the *injury of the United States.* He seeks merely to be given the contract to prospect as to his homestead, which the United States, speaking through the Congress, provided that he should have. In the *Wilson; Proctor* and *Skeen* (first count) cases, cited by the Circuit Court of Appeals [R. 379], the plaintiffs sought *to deprive the United States of title.* In other words, in these cases plaintiffs sought a title in fee and, under the circumstances, the United States was

an indispensable party, as it would have been injured by losing title to such mineral. These cases were against the United States, and the relief sought could have been granted only by the United States. For the convenience of the court we call attention to the facts of these cases, which make them inapplicable:

In the case of *Wilson v. Elk Coal Co.*, 300 Fed. 473, C. C. A., 7 Fed. (2d) 112, the facts disclose that plaintiff did not have any title to the land, but had simply a preference right of entry under the Purchase Act. The United States had title in fee. The Land Department rejected Wilson's right to purchase and the land reverted to the public domain. Several years thereafter the United States leased the coal rights to the defendants. Whereupon Wilson brought suit against defendants to declare a trust and to cancel the lease without making the United States a party. He alleged that "equitable title vested in him as against the United States". The District Court decreed that there was no jurisdiction in the absence of the United States, using the following language:

> "Until the *issuance of patent,* inquiry as to the equitable rights of parties is within the cognizance of the Department. . . . His remedy is against the Secretary of the Interior to *compel the issuance of patent.* If patent to the land had issued to the defendant, and plaintiff had a vested right by reason of acts done pursuant to law, he might maintain an action to decree such title in trust for the plaintiff. The patent not having been issued, the relief herein sought cannot be granted."

The Circuit Court of Appeals, in affirming the decree of the District Court, took the same position and assumed, on the issue of jurisdiction, that Wilson had an equitable right to *purchase the fee title under the Purchase Act* from the United States, and that his action was predicated upon this fact.

Naturally, the United States was an indispensable party in the *Wilson* case, since he was claiming title as against the United States, and it would have been injured by an adverse decision. The United States had a direct interest in the suit, as it would have lost title if plaintiff had prevailed.

In the instant case the petitioner holds a patent and the issue is the enforcement of equities vested in him by virtue of being the patentee. The United States is not interested in the suit, nor can it be adversely affected as the result of any decree rendered. For this reason, we think the *Wilson* case relied upon by the Circuit Court of Appeals is clearly distinguishable on its facts and the remedy invoked. Its reasoning supports the contention of petitioner.

In the case of *Proctor v. Painter*, 300 Fed., 476, C. C. A., 15 Fed. (2d) 974, the facts disclose that this suit pertained to two parcels of coal land. One was owned outright by the United States, with a lease of coal rights to a coal company. The other was owned under a restricted title by Painter, with coal reserved to the United States. As to this latter, Proctor contended that Painter

was entitled to a patent in fee and that Painter should be made trustee for this fee title as against the United States. The purpose of the suit was to declare Painter trustee of the fee title to all the land, plaintiff contending that fee title passed to him.

The above case, cited by the Circuit Court of Appeals, follows the reasoning in the *Wilson* case and follows the rule announced above, since, if the plaintiff had prevailed, *the United States would have been deprived of title.* Any claim which the plaintiff Proctor had was predicated upon the Purchase Act. He sought a fee title to the land; hence, the District Court states that, since he sought title to the land, and since title was in the United States, the United States was an indispensable party. The Circuit Court of Appeals bases its decision upon these grounds, as will be seen from the quotation given on page 974 of that opinion.

> "As to the south half of the quarter section the appellant contends that title passed absolutely to Painter under his patent, because the patent contained no reservation of the underlying coal, and that the right of the appellant to proceed against Painter was not affected by the subsequent quitclaim to the United States. . . ."

CONCLUSION.

In principle and on the facts the instant case is similar to the following authorities holding that the United States is not an indispensable party, as it is not interested in the result of the suit, nor would it be injured by any decision rendered:

Witbeck v. Hardeman, supra;
Alaska Oil Fields v. Rains, supra;
Skeen v. Lynch, supra (second count).

It is clearly distinguishable from the three authorities cited by the Circuit Court as the rule applicable here, holding that the United States was an indispensable party, namely:

Wilson v. Elk Coal Co., supra;
Proctor v. Painter, supra;
Skeen v. Lynch, supra (first count).

In these latter cases the facts show that the relief sought was against the United States. Any decision in these cases favorable to plaintiff would have injured the United States, as it would have deprived the United States of title to the mineral.

It is respectfully submitted that the opinion of the Circuit Court of Appeals for the Ninth Circuit is in direct conflict with the opinion of the Fifth Circuit Court of Appeals, which opinion has been affirmed by this court, and in which the facts and remedy are identical with the instant case on the issue of jurisdiction.

It is submitted that it is in direct conflict with the opinion of the Tenth Circuit Court of Appeals in *Skeen*

v. Lynch (second count). These opinions support the well-established rule that the United States is not an indispensable party if it has no interest in the result of the litigation, and would not be injured thereby. These opinions are not repugnant to the decisions cited by the Circuit Court of Appeals, as in each of these cases the plaintiff *sought title as against the United States.* The United States is not interested in the instant case, nor can it be affected by the substitution of the petitioner as permittee and lessee. The terms of law fix the right of petitioner to prospect on his homestead, and the Secretary has no discretion in the matter as the law is mandatory.

Wherefore, in view of the foregoing, it is urged that this petition be granted, in order that this Honorable Court may pass upon this important question, reverse the decision of the United States Circuit Court of Appeals, and remand the same to that court for further proceedings, and thus relieve petitioner of the grievous injustice that has been done him on account thereof.

Respectfully submitted,

JEFFERSON P. CHANDLER,
HOWARD W. WRIGHT,
ARCHER B. DORMAN,
Attorneys for Petitioner.

631 Van Nuys Building, 210 West Seventh Street,
Los Angeles, California.